No. 89-1324

(3)

In The

Supreme Court of the United States

October Term, 1989

GANNETT CO., INC.,

Petitioner,

v.

STATE OF DELAWARE and
STEVEN B. PENNELL,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Delaware

STATE OF DELAWARE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the First Amendment prevent a trial judge, in a highly publicized, lengthy, and costly murder prosecution, from deferring public disclosure of the names of jurors until after the end of the trial, in order to prevent the risk of a mistrial because of the possibility of harassment of jurors?

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Respondent, the State of Delaware, asks this Court to deny this petition seeking review of the judgment of the Supreme Court of Delaware entered on November 13, 1989.

OPINIONS BELOW

The judgment order of the Delaware Supreme Court, entered November 13, 1989, is recorded at 567 A.2d 420

(table) and is reproduced at Pet. for Cert. App. at A-63. The opinion of the Delaware Supreme Court, issued February 22, 1990, is, as yet, unreported but is reproduced in the appendix to petitioner's Supplemental Brief at A-1. The final, post-trial opinion of the Delaware Superior Court, issued March 2, 1990, which ordered the disclosure of the jurors' names, is not reported, but is reproduced in the appendix to respondent Pennell's Brief in Opposition at A-1 to A-18.

SUMMARY OF THE ARGUMENT

Petitioner ("Gannett") frames the question as being whether, under the First Amendment, the public in Delaware has a "right to know" the names of jurors seated in criminal trials. The State believes that, except in extraordinary circumstances, the answer to that question is "yes." Regardless of what answer the First Amendment may command, the Delaware General Assembly has presumptively committed jurors' names to the public domain. Del. Code Ann. tit. 10, sec. 4513(a) (Supp. 1988) (Pet. for Cert. at 2). Indeed, in this case, the names of the jurors who decided respondent Steven Pennell's fate are now part of the public record. *See* Opinion and Order of Del. Superior Court (March 2, 1990) (reproduced at Resp. Pennell's Br. in Opp. App. at A-1 to A-18). Thus, the real issue presented here is not one of "access" but one of "timing": specifically, does the First Amendment preclude a trial court, in an otherwise entirely open trial, from deferring public disclosure of the names of the jurors until the end of trial in order to serve the significant interest in not having the trial aborted because of the

possibility of juror harassment? The State believes that because the First Amendment's goal of fostering governmental accountability was not undermined by the conduct of the Delaware courts here, review in this case is inappropriate.

COUNTER-STATEMENT OF THE CASE

The facts of the case can be easily summarized. Respondent, Steven B. Pennell, was charged with three counts of capital murder for the highly publicized killings of three young women. During a two month trial (a proceeding entirely open to the public), the following twelve jurors and six alternates listened to all the evidence:

David S. Beck
Mary A. Brzoska
Michael P. Cunningham
Richard W. Diehl
Margaret R. Jackson
Chris A. Jackson
Marianne Kamalski
Catherine A. Kelleher
William A. Marshall, Jr.
Jeanne Minner
William Nice
Sue N. Orr
Mark A. Palladinetti
John K. Pierson
Joseph H. Richards
Barbara E. Spade
Christine L. Van Arsdalen
John A. Yeatman

List of Jurors and Alternate Jurors (filed March 9, 1990). After deliberating for six days, the jury found Pennell guilty of two of the three murders. They sentenced him to two terms of life imprisonment rather than death. Gannett now argues that because the trial court did not announce the above jurors' names during jury selection but postponed such disclosure until after judgment, the public was deprived of information essential to an informed debate about the administration of justice.

The reasons for the trial court's decision not to announce the jurors' names at *voir dire* date back to 1987 and 1988. In that period, four young women were murdered just south of Wilmington, Delaware; another young woman had disappeared. As might be expected, these events received extensive media coverage, with the reports suggesting that the murders had been the work of a "serial" killer. In November 1988, Pennell was charged with killing three of the women and the prosecution announced that it would seek the death penalty. All of these victims had been bound and tortured and, in each case, a nipple of the victim had been mutilated. Media coverage of Pennell's arrest was extensive. Gannett's Supp. Br. App. at A-4 & n. 2. In the succeeding three weeks, *The News Journal*, the widely-circulated, local newspaper published daily by Gannett in Wilmington, ran twenty-seven articles focusing on the crimes, the charges, and Pennell. *See* Pet. for Cert. App. at A-45 to A-46 (listing *The News Journal* articles by titles). In addition, the homicides and Pennell's subsequent arrest received coverage on both local and national television.

The publicity had not abated by March 1989 when the Superior Court of New Castle County sat to hear Pennell's suppression motion. Between December 21, 1988 and March 1989, *The News Journal* had published ten more articles about the case. Pet. for Cert. App. at A-45 to A-46. Daily news coverage continued during the suppression hearing, a proceeding which was fully open to the public. During the summer months of 1989, the Superior Court conducted a second round of hearings which also were completely open to the public. These hearings focused on the admissibility of evidence linking Pennell to

the killings based on DNA analysis of several items recovered from his automobile. Again, the print and electronic media extensively reported the proceedings. Pet. for Cert. App. at A-23.

At about the same time as the Superior Court was conducting these DNA hearings, *The News Journal* published an article about the jurors sitting in another high profile capital murder case being held in an adjoining county ("the Lynch case"). In the article, each juror was identified by name and community and then described in a personal profile. Pet. for Cert. App. at A-30 to A-31 (reproducing article). Apparently, this was the first time in Delaware history that a newspaper had published the names of impaneled jurors while a trial was in progress. Gannett's Supp. Br. App. at A-5 to A-6; Pet. for Cert. App. at A-25. As the dissenters in the state supreme court suggested, the article "constitute[d] journalism of questionable quality" in that the profiles "tend[ed] to trivialize jury service, focusing primarily on the age, physical characteristics, and family size of the jurors." Gannett Supp. Br. App. at A-33.[1]

Because of the extensive publicity which had surrounded the Pennell proceedings, and in light of the recent media dissemination of jurors' identities in the

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[1] This article about the jurors in the Lynch case bore a striking resemblance to articles published forty years ago by a Cleveland newspaper during the infamous "Dr. Sam Sheppard" murder prosecution. Those earlier articles in Cleveland had also focused on the trial jurors and had been published prior to deliberations or verdict. *See Sheppard v. Maxwell*, 346 F.2d 707, 762-65 (6th Cir. 1965) (appendices F through I of dissenting opinion of Edwards, J.), *rev'd*, 384 U.S. 333 (1966).

Lynch case, the Superior Court, on July 28, 1989, directed the court clerk not to disclose to anyone except the attorneys for the parties the names of persons summoned for jury service in Pennell's case. Under the order, entered *sua sponte* by the court, each person called for service would be assigned a number which would then be used during the jury selection. Gannett's Supp. Br. App. at A-6; Pet. for Cert. App. at A-2 (Superior Court's order). As the trial judge later explained in a written opinion, he chose this course for three reasons: (1) to protect the privacy of the persons summoned for jury service; (2) to prevent harassment of the jurors; and (3) to protect the State's interest in obtaining a final conclusion of the trial without undue delay or expense. As to the latter two grounds, the court found that in this extraordinary case, because of the pervasiveness of the publicity, there was "a substantial probability" that should the jurors' names be made public, people, both well- and ill-intentioned, would attempt to talk to the jurors or their families about the case. Moreover, he concluded that there was also a "substantial likelihood" that such people would express their opinions before the jurors could fend them off. Pet. for Cert. App. at A-39, A-42. *See also* Pet. for Cert. App. at A-7 (bench ruling). The trial judge feared that even if the jurors could remain unbiased despite the extraneous contacts, they might resent the harassment and, as had actually occurred in the Lynch case, request to be excused from service. Pet. for Cert. App. at A-35 & n. 7; Pennell's Br. in Opp. App. at A-3 n. 3.[2] If those requests forced a

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[2] In the Lynch case, after the publication of the jury profile by *The News Journal*, one of the jurors seated had asked to be

(Continued on following page)

mistrial, the costs would be substantial. The trial was projected to last 12 to 15 weeks, cost almost $500,000, and involve more than 100 lay, expert, and police witnesses. Pet. for Cert. App. at A-33 to A-37. The trial judge found that the other alternatives to prevent such contacts, such as sequestration of the jury prior to deliberations, would be unduly burdensome. In light of the anticipated length of the proceeding, sequestration would not only be costly to the taxpayers (possibly an additional $250,000), but work an extreme hardship on the jurors. Pet. for Cert. App. at A-35 to A-36.

Right before jury selection was to begin, Gannett, as publisher of *The News Journal*, moved to intervene and asked the trial judge to lift his prior order as it barred disclosure of the jurors' names during the upcoming *voir dire*. With Pennell and the prosecution both acquiescing in non-disclosure, the trial judge refused to vacate his order. Pet. for Cert. App. at A-3 to A-8.[3]

(Continued from previous page)

excused, not because of any bias, but because his wife had become extremely upset out of a fear of receiving "crank" calls.

During jury selection in the Pennell case, one potential juror expressed a similar concern. He feared that if his unique name was published, people might harass members of his family or him. He candidly conceded that if his wife was contacted that the intrusion "might affect me." Pet. for Cert. App. at A-35 n. 7.

[3] The trial judge originally explained the motivations for his July 28 order in a ruling from the bench. Pet. for Cert. App. at A-3. He subsequently issued a written opinion outlining his authority to enter the order and the reasons for his decision. Pet. for Cert. App. at A-22.

The Superior Court then conducted the *voir dire*. The procedure was completely open to the public but the members of the jury panel were identified by the court, its personnel, and the parties solely by use of the pre-assigned numbers. After 106 panelists were individually questioned, five women and seven men were impaneled as jurors and three men and three women as alternates. Several days later the trial began. It ran much as the trial judge had expected. During the following 8 weeks, 93 witnesses testified, including 2 experts on DNA analysis. Two hundred eighty-three exhibits were introduced into evidence. *The News Journal* and the electronic media reported on the trial daily, including live television reports from the courthouse and several television specials. Pennell's Br. in Opp. App. at A-2 n. 1. Finally, on November 28, 1989, the jury found Pennell guilty of two of the murders, but was unable to reach a verdict on the third murder charge. At the conclusion of the subsequent capital penalty hearing, the jury sentenced Pennell to two terms of life imprisonment for the two homicides.

During the trial, Gannett had appealed the trial court's non-disclosure order to the Delaware Supreme Court. In its appeal, the publisher argued, both on state law and First Amendment grounds, that the trial judge had an obligation to disclose the jurors' identities at the time of their selection and impaneling. The court granted expedited review and heard oral arguments twice. Pet. for Cert. App. at A-21, A-61. Fifteen days before the jury returned its verdicts, a divided *en banc* Delaware Supreme Court issued a short judgment order, without opinion, affirming the trial judge's decision. The court

indicated that a written opinion would be subsequently issued. Pet. for Cert. App. at A-63.

Back in the trial court, after the end of the trial, *The News Journal* once again requested the Superior Court to release the names of the jurors. The State indicated to the trial judge that it believed that the names should be disclosed. From the prosecution's perspective, the interest in preventing a mistrial because of extraneous contacts with the jurors had, by then, been satisfied. Tr. of Chambers Conf. at 4 (Dec. 7, 1989). The trial judge decided to await the explanatory opinion of the state supreme court before rendering a decision on the newspaper's post-trial application.

Two months later, the state supreme court issued its written opinion. Taking a different perspective than the trial court, the majority of the state supreme court found that, as a matter of state law, the names of jurors were not invariably matters of public record. Instead, section 4513(a) of title 10 of the Delaware Code, modeled on section 9(e) of the Uniform Jury Selection and Service Act (1970) (*reprinted in* 13 U.L.A. 437, 455), vested in trial judges the discretionary authority to withhold public disclosure of jurors' names. In this case, in the majority's view, the Superior Court had not abused that power. Gannett's Supp. Br. App. at A-20 to A-25, A-30. Turning to Gannett's First Amendment claim, the majority applied the "experience and logic" test enunciated in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). After surveying both local and common law history, as well as the current statutory requirements in other jurisdictions, the majority concluded that Gannett "had failed to carry its

burden of establishing any historical tradition of constitutional dimension regarding public access to jurors' names." Gannett's Supp. Br. App. at A-14 to A-26. Similarly, the majority found that public disclosure at the time of jury selection would not play "a significant positive role in the trial or selection of the jury." *Id.* Thus, Gannett had also failed to meet the second threshold test of "logic." *Id.* at A-26 to A-30. Finally, because Gannett had not established any constitutional right of access to the jurors' names, the majority ruled that it did not have to examine the adequacy or weight of the reasons given by the trial court for not disclosing the jurors' names during the *voir dire*. *Id.* at A-30 to A-31.

The two dissenters reached a different conclusion on both prongs of the "experience and logic" test. According to the dissent, disclosure of jurors' names was presumptively mandated not only because such disclosure constituted a part of the open *voir dire* process, but because historically, both under English practice and in the early days of this country, jurors' names had been publicly announced. Gannett's Supp. Br. App. at A-37 to A-45. In addition, the dissenters found that public disclosure of jurors' names furthers the functional goal of "promoting fairness and the appearance of fairness." *Id.* at A-48. In the dissent's view, public disclosure of jurors' names impressed the jurors with a sense of responsibility; allowed the public to monitor the "representativeness" of the jury; and, in some cases, acted as a hedge against jurors' misrepresentations during the *voir dire* process. *Id.* at A-51 to A-54. Having thus found a "qualified right of access," the dissenters then concluded that the reasons given by the trial judge to support non-disclosure were

not sufficiently compelling to support an anonymous jury. *Id.* at A-54 to A-57.

Within a week after the entry of the state supreme court's opinion, the Superior Court issued an order and opinion concerning the post trial release of the jurors' names. Although all the jurors in a post-verdict poll had informed the trial judge that they did not wish to have their names disclosed, the trial judge ordered that the jurors' names be made part of the public record. Pennell's Br. in Opp. App. at A-1 to A-18. No appeal has been taken from that order.

REASON FOR DENYING THE PETITION

The Trial Court's Orders Which Delayed, Until the End of Trial, Public Disclosure of the Jurors' Names in This Highly Publicized Murder Prosecution Were Consistent With This Court's Prior Decisions Concerning the Public's Right of Access to Criminal Trials.

The State agrees that " '[a] trial is a public event [and] [w]hat transpires in the court is public property.' " *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577-78 (1980) (Brennan, J., concurring) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). If nothing else, the Sixth Amendment precludes the government from treating a criminal trial, and the information generated by it, as an internal private proceeding not to be opened to, or shared with, the public. *Waller v. Georgia*, 467 U.S. 39, 46 (1984). And the State believes that, in Delaware, the General Assembly, by Del. Code Ann. tit. 10, sec. 4513(a) (Supp. 1988) (Pet. for Cert. at 2) has, in most cases, committed to

the public domain the names of persons summoned for jury service, including those actually selected to sit in judgment. Thus, the State agrees with the dissenters in the state supreme court that, in Delaware, section 4513(a) "create[s] a presumption of openness" with regard to jurors' identities. Gannett's Supp. Br. App. at A-43 to A-44. And, again using the language of the dissenters below, the State believes that section 4513(a) reflects a policy decision by the Delaware legislature that the jury is "fundamentally a public institution and that anonymity serves to impair both the jury's sense of responsibility to the public and the public's faith in the jury." Gannett Supp. Br. App. at A-48 to A-49. But, at the same time, the State does not read either the state statute or the First Amendment as requiring that, in all instances, the names of the jurors must be revealed at the time of the *voir dire* selection process. As all the parties agree, in the face of other compelling interests, such as protecting the safety of the jurors or maintaining the privacy of jurors, a trial court may permanently withhold from the public and the parties the identities of jurors. But the State does not think, as Gannett does, that "compelling interests" are the only exception to the presumption of disclosure during the *voir dire* process. Where disclosure contemporaneous with selection would risk prejudice to a significant, legitimate countervailing interest, there is nothing in the First Amendment, nor in section 4513(a), which commands that the jurors' names be announced "sooner rather than later." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 20 (1986) (Stevens, J., dissenting) ("*Press-Enterprise II*"). In the past, this Court has indicated that the "closure" of a criminal trial can be justified only on the basis of a

"compelling governmental interest," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), or a "higher value[ ]," *Press-Enterprise II*, 478 U.S. at 13, incapable of being protected by other reasonable alternatives. But in all this Court's earlier cases, the closure imposed resulted in the public's inability to observe the live testimony to be given by witnesses or prospective jurors. In such situations, subsequent access, by way of the later release of a transcript of the proceedings, undermines one of the fundamental premises for mandating access. The "cold record" of a later transcript "is a very imperfect reproduction of events that transpire in the courtroom." *Richmond Newspapers*, 448 U.S. at 597 n. 22 (Brennan, J., concurring) (internal quotation and citation omitted). In contrast, when, as in Pennell's trial, the proceedings from *voir dire* through trial have been open to public view and only the "cold" names of the jurors have been temporarily held back, the interests underlying public access are not seriously compromised. Jurors' names, like trial exhibits offered during a trial, but "unlike live proceedings, do not contain unrecordable subtleties." *In re the Reporters Committee For Freedom of the Press*, 773 F.2d 1325, 1337 (D.C. Cir. 1985) (Scalia, J.).

Consequently, much like the legislature's power to impose reasonable time, place or manner restrictions on speech in other public fora, a trial court, in certain limited circumstances, can validly choose to delay, temporarily but not absolutely, public disclosure of jurors' names. So long as the delay in disclosure (1) furthers a significant state interest; (2) does not reflect an attempt to censor the

legitimate use of the jurors' identities;[4] and (3) will not substantially undermine the public's ability to monitor the administration of justice, the presumptive right of contemporaneous access may be overcome.[5] *Cf. Reporters Committee for Freedom*, 773 F.2d at 1354-55 (Wright, J., concurring and dissenting in part) (suggesting that lower standard than compelling interest is applicable for order delaying until after judgment disclosure of trial exhibits). Such a standard allows the trial court to protect the interest of "maintaining an impartial jury, [with] its inherent vulnerability," *United States v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987), *cert. denied sub nom. Times Picayune Publishing Corp. v. Edwards*, 108 S.Ct. 1109 (1988), while insuring that the court does not "deny or unwarrantly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to the public places." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 511 n. 10 (1984) (internal quotation and citation omitted).

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[4] Of course, an order which delays access to jurors' names is not "content-neutral" in the traditional sense; it is aimed at postponing a particular disclosure. However, the purpose of the deferral order is not to censor information or restrict its communicative impact; the actual names of the jurors are largely irrelevant. Instead, such orders are justified as a means to preclude access to the jurors during the trial and, in turn, regulate the "secondary" harm of jury harassment. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Boos v. Barry*, 108 S.Ct. 1157, 1162-64 (1988) (opinion of O'Connor, J.).

[5] Just as with other time, place, and manner restrictions, the trial judge need not, prior to entering such an order, exhaust all other available or imagined "least restrictive alternatives." *See Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2757-59 (1989).

Indeed, the authority of trial courts to defer disclosure to the public of jurors' names in the face of significant countervailing interests has not been previously the subject of controversy. As one court has noted, "[t]he right of the Court to protect the anonymity of the jury through trial, deliberations, and verdict appears undoubted and neither newspaper seeks to challenge it here." *United States v. Doherty*, 675 F.Supp. 719, 722 n. 4 (D. Mass. 1987). *See also Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, Recommendation C-1, Committee Comment, *reprinted at* 87 F.R.D. 519, 530 & nn. 14-15 (1980) (endorsing prophylactic measure of not releasing jurors' names in widely publicized or sensational criminal trials).

1. The Significant State Interest Supporting Deferral

The trial court's conduct in this case, as it deferred disclosure of the seated jurors' names until after the trial, was consistent with this approach. As the trial court recognized (Pet. for Cert. App. at A-34, A-37), once the trial started, the prosecution had a significant interest in having the proceedings completed to verdict without undue delay or expense. *See Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988). The trial, expected to last 12 to 15 weeks, constituted a huge commitment of time by the parties and their counsel, court personnel, the nearly 100 witnesses, and, most importantly, the eighteen jurors and alternates. The financial cost of the trial was also high: besides the normal costs attendant to any trial, the prosecution's case was built, in large part, around the testimony of experts

explaining and interpreting the DNA analysis performed during the investigation. If the trial was aborted, all of these costs (both in time and money) would again have to be paid. In addition, many of the witnesses would have to testify again, possibly resurrecting for a second time painful memories. Pet. for Cert. App. at A-37. *See Morris v. Slappy*, 461 U.S. 1, 15 (1983) ("The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources."); *United States v. Hasting*, 461 U.S. 499, 507 (1983). Finally, given the background of a string of possibly "serial" murders, there was an additional, strong public interest in having a prompt determination whether Pennell was the killer or whether the police should be forced to resume their investigation.

Moreover, the trial judge was not demonstrably incorrect when he surmised, given the pervasive publicity this case had already received, that there was a good risk that if the jurors' names were made public, and then widely disseminated by the press as in the Lynch case, people, either ill- or well-intentioned, might simply use a telephone book and call the jurors to express their views on the guilt or innocence of Pennell. Pet. for Cert. App. at A-39, A-42. *See Sheppard v. Maxwell*, 384 U.S. 333, 353 (1966) ("The numerous pictures of the jurors, with their addresses, which appeared in the newspaper before and during the trial exposed them to expressions of opinions from both cranks and friends."). *Cf. Edwards*, 823 F.2d at 113, 118 (emphasizing "special volatility of publicity when it is focused, not on the merits of the case, but the jurors themselves" to uphold order deferring release of

transcript of closed, mid-trial hearing on "possibility, however slight" that the disruptive information might reach sequestered jury). Though the prosecution could never say that if such contacts did occur the jurors would have had to be excused for bias, the prosecution's fear, grounded in the events in the Lynch case, was that such contacts would cause jurors to be reluctant to continue to serve. In turn, this reluctance by the jurors may have forced a mistrial.

In short, while the order barring disclosure here was not essential to guarantee Pennell a fair trial, it was narrowly tailored to further the significant interest of insuring that the trial, once started, was not aborted, forcing society to bear the huge costs of a retrial.

2. The Lack of Injury to the Societal Values Underlying the Right of Public Access

Most importantly, the orders which delayed disclosure of the jurors' identities until after trial did not undermine any of the societal and functional values identified by the dissenters below as underlying the right of public access. First, delayed disclosure, in contrast to permanent secrecy, still afforded the members of the general public, if they chose, the opportunity to judge the public nature of the jury. By scrutinizing the list of names when it was announced after trial, members of the public could assure themselves that the jury was, in fact, a symbolic representative of the community, composed of "their neighbors, fellows, and associates" and "bringing the public's values and common sense to bear upon the problems of justice." Gannett's Supp. Br. App. at A-47 to

A-51. Secondly, by merging the information available through the totally open *voir dire* and trial with the subsequent disclosure of identities, the public could still ferret out arbitrary, overreaching or even corrupt action by the participants during both jury selection and trial. And finally, if the jurors were aware (or simply feared) that their names would be eventually disclosed at the end of the trial, the jurors realized that they would be held accountable in the public forum for their verdicts. Thus, despite their temporary anonymity, the jurors understood "the sense of personal responsibility that is so vital to the integrity of the jury system." Gannett's Supp. Br. App. at A-51. Indeed, the only functional interest that might have been arguably compromised by the failure to allow disclosure during *voir dire* was the possibility that, if the jurors' names had been announced, the members of the public might have come forward to assist the parties in ferreting out intentional or negligent misstatements by persons during the jury selection process. *Id.* at A-52 to A-53. But, as this Court has recently indicated, under our jury system, once a representative venire is assembled, decisions about the "biases" of particular venire persons rest almost exclusively in the hands of the parties. *Holland v. Illinois*, 110 S.Ct. 803, 807-09 (1990). Here, the parties chose not to have the additional input from the public in exercising those decisions about individual jurors, and the First Amendment surely does not force such information upon them. Further, if the jurors understood that their names will later be disclosed, they will be forced to toe the mark in their *voir dire* responses for fear that any deliberate falsehoods will, more than likely, be eventually "caught" by the public. Finally, if after trial, the members

of the public are able to point out a misrepresentation by a juror, the defendant can still bring that falsehood to the court's attention in a bid to overturn his convictions. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982).

In sum, the conduct of the trial judge here did not undermine the goal of ensuring governmental accountability.

CONCLUSION

The ruling below was consistent with the decisions of this Court. Consequently, there is no need to grant review in this case.

Respectfully submitted,

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